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Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. 97-234
of the Communications Act	)	
--Competitive Bidding for Commercial	)	
Broadcast and Instructional Television Fixed	)	
Service Licenses	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative	)	
Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

To: The Commission

REPLY COMMENTS OF LAKEFRONT COMMUNICATIONS, INC.

Lakefront Communications, Inc. ("Lakefront") by its attorneys, hereby files its Reply Comments on the Commission's above-captioned Notice of Proposed Rule Making, FCC 97-397, released November 26, 1997, in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264 (herein the "NPRM").[1]

The Arizona Board of Regents for Benefit of University of Arizona ("Arizona"), Board of Regents of the University of Wisconsin System ("UWS"), Boise State University ("BSU"), Central Michigan University ("CMU"), Iowa Public Broadcasting Board ("IPPB"), Kent State University ("KSU"), The Ohio State University ("OSU"), Ohio University ("OU"), St. Louis

[1]Reply Comments are due by February 17, 1998. See, 62 FR 65392, released December 12, 1997.

Regional Educational and Public Television Commission ("KETC"), State of Wisconsin-Educational Communications Board ("WECB"), and WAMC (collectively, the "NCE Broadcasters"), among others filed comments in this proceeding. Lakefront's instant reply is specifically addressed to the NCE Broadcasters Comments (the "Comments").

I. All Mutually Exclusive Applications for Commercial Channels Must Be Subject To The Auction Process.

It is obvious from the Comments that the NCE Broadcasters, on one hand want to be free to use the public spectrum allotted to commercial channels, but on the other hand, they do not want to pay the auction price for the use of this publicly owned spectrum. The Comments present a quandary to the Commission, but suggest no solution.

It is obvious from the Comments of the NCE Broadcasters in this proceeding the outcome of the rulemaking they most desire is to give an insurmountable advantage to an NCE Broadcaster in any case in which the NCE Broadcaster's application for a commercial channel is mutually exclusive with that of a commercial broadcaster. The quandary the Comments present is that no qualified mutually exclusive application may be simply dismissed without some form of due process.

This is a quandary which the NCE Broadcasters themselves cannot solve and do not even suggest a possible solution. In cases where there are mutually exclusive applications for a commercial channel filed by both non-commercial and commercial applicants, the NCE Broadcasters submit that Congress intended that there be no auction of the spectrum. If that were true, there would be no way to award the permit since the only two other alternatives would be a lottery or a comparative hearing and neither method is authorized for the assignment of

commercial spectrum. Otherwise, the commercial applications would have to simply be dismissed so that the NCE Broadcaster's application can be granted. Any mutually exclusive applicant is entitled to some form of due process before its application can be dismissed. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*"). The only exception to the *Ashbacker* rule is in situations in which the FCC changes the rules through the rulemaking process or the Congress amends the *Communications Act*. See, e.g. *Multistate Communications v. FCC* (WOR-TV), 728 F.2d 1519 (D.C. Cir. 1984) (Where the congress changes the law applicants may lose their preexisting rights).

II. NCE Offers No Practical Solution To Their Proposal.

The NCE Broadcasters cite several examples of mutually exclusive commercial and non-commercial situations. For example at pp. 5-6 of the Comments, the NCE Broadcasters cite a situation in which Central Michigan University has a pending application for a commercial FM channel which is mutually exclusive with five other applications. Three of these are noncommercial applicants and three are commercial applicants. At p. 8 of the Comments, NCE Broadcasters conclude, "that the public interest is not well served by auctioning channels when one of the applicant[s] proposes to use the channel on a noncommercial educational basis, while the other applicants propose commercial uses."

While the NCE Broadcasters urge that an auction is not a public interest solution to resolve the conflict, the Comments do not even hint at what the NCE Broadcasters believe is a public interest solution to resolve such a conflict. In this case, before a lottery between the mutually exclusive noncommercial applications can be held, the commercial applications must either be dismissed or included in the lottery. The Comments do not suggest that the FCC has

either the power to summarily dismiss the commercial applications or include these applicants in a lottery thereby denying the federal treasury the benefit of the proceeds from an auction. Since the Congress clearly gave the FCC neither power, the Congress could only have intended that all applications for a commercial channel be subject to auction.

III. The Congress Did Not Intend That Noncommercial Applicants Be Given Preference To Commercial Applicants In Resolving Mutual Exclusivities.

The NCE Broadcasters' Comments combine Section 309(j)(2)(c) and Section 397(6) of the *Communications Act* in order to support the conclusion that noncommercial applicants for commercial channels should not be subject to auction. However, the Congress did not amend Section 309(j)(4)(D) of the *Communications Act* to include noncommercial applicants as one of the group entitled to a preference in the competitive bidding system. That group remains small businesses, rural telephone companies, and businesses owned by minority groups and women. If the Congress did not intend to give noncommercial applicants a preference under the competitive bidding system, surely the Congress did not intend noncommercial applicants an absolute preference outside of the competitive bidding system.

IV. To Give Noncommercial Applicants A Preference Over Commercial Applicants Is To Create A "Pandora's Box" Solution.

The entire purpose of the competitive bidding system is to eliminate comparative hearings and provide funds to the federal treasury. In 1981, the FCC decided that only the general partner of a limited partnership should be considered in deciding the award of such comparative hearing preferences as integration, local ownership, minority ownership and past broadcast experience. See, *Anax Broadcasting, Inc.*, 87 FCC2d 483 (1981) ("*Anax*"). The FCC spent the next fifteen years in lengthy hearings culling out sham limited partnership applicants

from *bona fide* limited partnership applicants.[2] Yet were noncommercial applicants to be given an absolute preference as against commercial applicants for the same commercial channel and, moreover, be excused from the competitive bidding process, the FCC would once again open its processes to invite "sham" applicants.

The NCE Broadcasters are but one class of a large group of classes that are eligible for reserved channels pursuant to Section 73.503 of the FCC's rules. If the FCC rules so favored any applicant able to clothe itself in the guise of a noncommercial applicant and gain use of a valuable commercial channel without cost, the history of FCC hearings following the *Anax* decision teaches us that there are those who will happily assume such a disguise. After all, once such an applicant secures a license to operate on a commercial channel it is immediately free to sell that channel to a commercial licensee for whatever price the market will bear. The FCC is precluded by Section 310(d) of the *Communications Act* from considering in the case of such an assignment application "whether the public interest, convenience, and necessity might be served by the transfer, assignment or disposal of the permit or license to a person other than the proposed transferee or assignee." In such a case, the only way to determine whether such an applicant is *bona fide* or a sham would be to hold a hearing. The avoidance of unnecessary hearings is precisely what the Congress tried to accomplish when it created the competitive bidding process.

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[2]See, e.g. *Annette B. Godwin*, 8 FCC Rcd. 4098, 4104 (Rev. Bd. 1993).

V. Conclusion.

The NCE Broadcasters are already entitled to exclusive use of a large block of spectrum which spectrum is not available to commercial broadcasters. Yet the thrust of the NCE Broadcasters Comments is that they also covet the right to exclusive use of any commercial channel for which they apply. They seek not a level playing field, but rather one in which they have an exclusive right to use spectrum assigned by the FCC to commercial broadcasters. It is obvious that the public interest does not support such a bizarre proposal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Angela Y. Powell, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on this 17th day of February, 1998, copies of the foregoing were mailed, postage prepaid, to the following:

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